

# Something less than ready access to the courts: Section 139 & Local Authorities

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## **Introduction**

Psychiatric patients who wish to bring legal proceedings against those responsible for their detention or treatment can face an obstacle of which better-favoured litigants are free: because of a provision contained in section 139 of the Mental Health Act 1983 they will often have to obtain the prior leave of the High Court.

This paper will consider the origins of that provision. It will then focus on two of its key elements - the requirement for leave itself and the exceptions to it - and will analyse their impact upon subsequent case-law and upon current legal practice.

In so doing, this paper will describe an anomaly which continues to bedevil intending claimants, and will assess the extent to which it is attributable to the legal and political events of a generation ago, and to a legislative impulse which is even more keenly felt today.

## **The 1959 Act**

The requirement that the proposed proceedings of mental patients be subjected to preliminary scrutiny did not originate in the 1959 Mental Health Act.<sup>1</sup> However, as with so many other aspects of modern psychiatric law, it is from this statute that the current restrictions derive. Those restrictions are contained in section 141 of the 1959 Act,<sup>2</sup> which reads as follows:

“(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this

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8 *Original emphasis*

9 *Op cit.*, at p 147

10 *Op cit.*, at p 294

11 [1998] COD 199

12 *Pountney v Griffiths* also played a key part in the yet more recent case of *R v Mental Health Act Commission, ex parte Smith*, Queens Bench Division, 11 May 1998, (1998) 43 BMLR 174

13 *Op cit.*, at p 141

section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules thereunder, or in, or in pursuance of anything done in, the discharge of functions conferred by any other enactment on the authority having jurisdiction under Part VIII of this Act, unless the act was done in bad faith or without reasonable care.”

“(2) No civil or criminal proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court, and the High Court shall not give leave under this section unless satisfied that there is substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care”.

According to Lord Simon, these restrictions place “a hindrance on the recourse of a class of citizens to the courts of justice”, the reason for which is easy to see:

“It must have been conceived that, unless such classes of potential litigant enjoy something less than ready and unconditional access to the courts, there is a real risk that their fellow citizens would be, on substantial balance, unfairly harassed by litigation”.<sup>3</sup>

### The case of Pountney v Griffiths

This was the most significant case to arise under section 141. Elvet Griffiths was a nurse at Broadmoor hospital. One visiting day, he approached a patient who was saying goodbye to his visitors and, with the words “Come on, you”, allegedly punched him on the shoulder, almost causing him to lose his balance. In proceedings instituted by the patient, Mr Griffiths was convicted of common assault and conditionally discharged for two years. His conviction was, however, quashed by the Divisional Court of the Queen’s Bench Division as the patient had not obtained prior leave of the High Court under section 141(2), and his proceedings were therefore a nullity.<sup>4</sup>

The patient appealed to the House of Lords, for whom the key question was whether acts of hospital staff in controlling patients were performed under the Mental Health Act, and therefore enjoyed the protection of section 141(2), notwithstanding the fact that such acts were not specifically authorised by that statute.

The appellant argued that the pre-1959 legislation dealt solely with the certification and reception of patients, that section 141 merely re-enacted that legislation, and that, as a result, it was similarly confined to those functions and could have no application to acts which went beyond them. Their Lordships did not agree. Lord Edmund-Davies held that the earlier legislation had been somewhat wider in ambit, and had included provision for acts performed to “carry out” the statutory purposes. From this he inferred “a right to control, its nature and extent depending upon all the circumstances”.<sup>5</sup> Furthermore, the effect of the 1959 Act had not been simply to re-enact what had gone before: its long title stated an aim “to make fresh provision” and, Lord Edmund-Davies concluded, “its contents establish that the aim has been achieved”,<sup>6</sup> not least by, *inter alia*, the introduction of a new system of definition and classification of mental disorder and the setting up of Mental Health Review Tribunals. It was clear that, “following upon the recommendations of the Royal Commission which reported in 1957, the legislature set out to establish an entirely new code for mentally disordered persons”.<sup>7</sup>

Though conceding that hospital staff did enjoy powers of control over their patients, the appellant had

14 See, for example: David Jessel, *Convenience, Compromise and Cash*, (1991) *New Law Journal*, 1 March, p 267

15 *Winch v Jones & another; Winch v Hayward and others* [1985] 3 All E.R. 97, per Sir John Donaldson MR at p 99

16 *Pountney v Griffiths* [1975], see note 3, above

17 *Op cit.*, at p 100

18 *Ibid.*

further argued that such powers derived, not from the 1959 Act (nor any statute), but from common law, and that their implementation would not therefore fall within section 141. Once again, their Lordships did not agree. Accepting the respondent's submissions on this point, Lord Edmund-Davies held that as section 141(2) specifically relates to "any act",<sup>8</sup> and not merely to those specified under the statute, its ambit would be sufficiently wide to cover the facts of this case.<sup>9</sup> Dismissing the appeal, His Lordship adopted the view of Lord Widgery C.J. in the Divisional Court, that:

"... where a male nurse is on duty and exercising his functions of controlling the patients in the hospital, acts done in pursuance of such control, or purportedly in pursuance of such control, are acts within the scope of section 141, and are thus protected by the section".<sup>10</sup>

*Pountney v Griffiths* was more recently cited by Auld LJ in *R v Broadmoor Special Hospital and the Secretary of State for the Department of Health, ex parte S, H and D*,<sup>11</sup> a case which, though it did not concern section 141, did consider the extent to which ancillary powers - here, the power to subject patients to routine random searches - might flow from the express authority to detain contained in the Mental Health Act. Adopting and applying the judgment of Lord Edmund-Davies, the Court of Appeal held that such a power might be inferred in this case.<sup>12</sup>

### **The 1983 Act**

Lord Simon's speech in *Pountney v Griffiths* had concluded with the following injunction:

"Patients under [the 1959 Act] may generally be inherently likely to harass those concerned with them by groundless charges and litigation, and may therefore have to suffer modification of the general right of free access to the courts. But they are, on the other hand, a class of citizen which experience has shown to be peculiarly vulnerable. I therefore presume to suggest that the operation of section 141 should be kept under close scrutiny by Parliament and the Department of Health and Social Security".<sup>13</sup>

As we shall see, during the lengthy period of contemplation which preceded the introduction of a successor to the 1959 Act, section 141 received intense scrutiny. It was eventually replaced by section 139 of the 1983 Act which, though it replicated many of its predecessor's provisions, also departed from it in at least two key respects, those being: (i) the requirement for leave; and (ii) the nature of its exemptions.

#### **(i) The requirement for leave**

In the absence of bad faith, section 141 and section 139 both provide - at sub-section (1) - a civil and a criminal defence for any act purporting to be done under the Act or its regulations. They contain a further provision, however, which differs considerably between them. In each, it is contained at sub-section (2), and in the 1983 version reads:

"(2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court; and no criminal proceedings shall be brought against any person in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions".

It will be noted that, unlike its predecessor, the 1983 Act is silent as to the hurdle facing those seeking

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19 *Op cit.*, at p 103

20 *Ibid.*, at p 104

21 Section 139(4); see below

22 Section 66(1), Sched. 9, para. 24(7)

23 Section 2(1), Sched. 1, para. 107(11)

leave. The 1959 Act had, of course, required any intending plaintiff to show “substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care”, thus replicating the substantive defence in the criterion for granting leave. However, the burden omitted from the 1983 Act was very soon reintroduced, albeit not by legislation and in a somewhat less exacting form than had previously obtained.

### The case of Winch v Jones

The unfortunate story of Miss Mary Winch has been set out in detail elsewhere.<sup>14</sup> Finding herself embroiled in a dispute over her late mother’s estate, and having dispensed with at least seven firms of solicitors, she refused to obey a court order to surrender the deeds to the family home and was committed to prison for contempt. She was subsequently transferred to a psychiatric unit, having been diagnosed as mentally ill and in need of compulsory treatment. Her state of mind at this point was subsequently, and somewhat acerbically, summarised as follows:

“As a result of her experience she formed the view that all the solicitors whom she had consulted were conspiring together to stifle her justified complaints. Whilst it is inherently unlikely that she is correct, this is not an uncommon reaction by a dissatisfied client. If this were itself a justification for compulsory detention, the mental hospitals would be over-full”.<sup>15</sup>

Once discharged, Miss Winch attempted to bring proceedings against a number of individuals - the two doctors responsible for her diagnosis and the hospital psychiatrist under whose care she had been detained for 12 months. However, her application for leave under section 139 of the 1983 Act was dismissed by the High Court, the judge having ruled that, though it was neither frivolous or vexatious, nor an abuse of the process of the court, it did not disclose a *prima facie* case of negligence. In the Court of Appeal, Miss Winch argued that she had in fact made out a *prima facie* case, but that she should only have been required to show that there was a serious issue to be tried.

Adopting Lord Simon’s exposition of the purpose of section 141,<sup>16</sup> Sir John Donaldson MR identified two “fundamental difficulties” which beset this aspect of the law:

“First, mental patients are liable, through no fault of their own, to have a distorted recollection of facts which can, on occasion, become pure fantasy. Second, the diagnosis and treatment of mental illness is not an exact science and severely divergent views are sometimes possible without any lack of reasonable care on the part of the doctor”.<sup>17</sup>

He did not believe that the existing authorities were of assistance in determining the correct test to be employed in cases such as this: the “*prima facie* case approach”, for example, “leads inevitably to a full dress rehearsal of the claim and the defence”, which would be inappropriate in an application such as

24 *Ashingdane v Secretary of State for Social Services and others, Court of Appeal*, 18 February 1980

25 *House of Lords Debates*, Col. 106

26 *Ibid.*, Cols. 933-946; 957-1008

27 *Ibid.*, Cols. 526-536; 541-602

28 *Ibid.*, Cols. 756-820; 826-852

29 *Ibid.*, Cols. 1124-1184

30 *Ibid.*, Cols. 841-925

31 *Ibid.*, Cols. 1041-1106

32 *Ibid.*, Cols. 1394-1434

33 *Mental Health Services Law and Practice* (1986, Shaw & Sons Ltd), para. 1.11.3

34 *House of Commons Debates, Special Standing Committee*, 24 June 1982, Col. 722

35 “Right to liberty and security”

36 “Right to a fair trial”

this. Electing to allow Miss Winch's appeal, he argued:

"The issue is not whether the applicant has established a *prima facie* case or even whether there is a serious issue to be tried, although that comes close to it. The issue is whether ... the applicant's complaint appears to be such that it deserves the fuller investigation which will be possible if the intended applicant is allowed to proceed".<sup>18</sup>

For his part, Parker LJ considered why the 1959 burden was absent from the new Act. There could be no question, he insisted, "but that it was intended that the protection afforded to those purporting to act under the Mental Health Acts [sic] should be reduced", and he added: "If an action is neither frivolous nor vexatious, it is *prima facie* fit to be tried; and if it is fit to be tried, in my view leave ought to be given".<sup>19</sup>

Though Lord Justice Parker concurred in the decision to allow the appeal and grant leave, his implicit acceptance of the "*prima facie* case approach", or something very like it, would appear to contradict Sir John Donaldson's express rejection of the same. However, the possibility that a *prima facie* test might still have some part to play was reduced by the third judge, Lord Justice Balcombe, who declared himself in agreement with the test advanced by the Master of the Rolls.<sup>20</sup>

As for Miss Winch, she had already initiated proceedings against the detaining health authority, for which she did not require leave<sup>21</sup> and in which she secured a settlement of £27,000.

## **(ii) Exemptions**

The second difference between section 141 and section 139 is that the latter contains exemptions which are not contained in the 1959 Act. Leave is not now required for proceedings against the Secretary of State for Health, a Health Authority or Special Health Authority, or a NHS Trust. The root of these exemptions (which were widened following changes in the nature of health provision introduced by the National Health Service and Community Care Act 1990<sup>22</sup> and the Health Authorities Act 1995<sup>23</sup>) may be found in an unreported case from the mid-1970s.

## **Mr Ashingdane's Case**

Mr Ashingdane had been detained at Broadmoor Hospital for seven-and-a-half years when, in October 1978, his RMO recommended transfer to the less secure Oakwood Hospital. This recommendation, endorsed by a second consultant psychiatrist, was accepted by the Secretary of State for Social Services in December 1978, and in March 1979 by the Home Secretary. For some years, however, members of the Confederation of Health Service Employees, which represented the Oakwood nursing staff, had resisted the transfer of restricted patients into the hospital. They argued that resources were so scarce that the treatment, rehabilitation and security of such patients would be prejudiced. The Kent Area Health Authority, which was responsible for the hospital, believed that to insist upon Mr Ashingdane's transfer to Oakwood, or to another similar institution, would be to invite industrial action by the nursing staff

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37 (1985) Series A, No. 93; 7 E.H.R.R. 528. But see also: *Kynaston v Secretary of State for Home Affairs* (1981) Cr. App. R. 281; *Kynaston v United Kingdom* (1981) European Commission of Human Rights (App. no. 9480/81) - which concerned acts of the Home Secretary and the Secretary of State for Health & Social Security, but not a Health Authority

38 House of Lords Debates, Col. 807

39 Ibid., Col. 804

40 Ibid., Col. 806

41 Ibid.

42 Ibid., 1 February 1982, Col. 1127

43 Ibid., 23 February 1982, Cols. 919-920

and to imperil the health and welfare of other patients. It therefore refused to transfer Mr Ashingdane, and for his part the Home Secretary refused to direct such a transfer.

In August 1979, Mr Ashingdane sought to challenge the validity of his continued detention at Broadmoor. He sought declarations: that the Secretary of State for Social Services had a duty to provide him with hospital accommodation at Oakwood or other appropriate hospital; that both the Secretary of State and the Kent Area Health Authority had acted *ultra vires* in refusing to admit him to Oakwood; and that CoHSE had acted unlawfully in soliciting or causing the Secretary of State and the Health Authority to breach their statutory duty. He also sought an injunction to restrain CoHSE from acting in this way.

Proceedings against CoHSE were stayed by the High Court in December 1979, because they had been instituted without leave under section 141(2) of the 1959 Act. In January 1980, those against the Department of Health & Social Security and the Kent Area Health Authority were stayed on the same grounds. In February 1980, the Court of Appeal lifted the stay on proceedings against CoHSE, but maintained it in respect of those against the Secretary of State and the Health Authority.<sup>24</sup> Leave to appeal to the House of Lords was refused in May 1980. Ultimately, proceedings against CoHSE were discontinued. At this point, Mr Ashingdane initiated a complaint under the European Convention on Human Rights. It is clear that the result of that complaint - or rather, the *anticipation* of that result - exerted a profound influence upon debate concerning the new Mental Health Act.

## New legislation

The successor to the 1959 Act was only arrived at tortuously and by a process which involved, not merely a new statute, but also intermediate amending legislation.

The Mental Health (Amendment) Bill was introduced into the House of Lords by Lord Elton, then Parliamentary Under-Secretary of State for the Department of Health & Social Security, and received its First Reading on 10 November 1981.<sup>25</sup> The legislative chronology is significant: after a Second Reading on 1 December 1981,<sup>26</sup> the Bill was committed to a Committee of the whole House and further considered on 19 January,<sup>27</sup> 25 January,<sup>28</sup> 1 February,<sup>29</sup> 23 February,<sup>30</sup> and 25 February 1982.<sup>31</sup> It received its Third Reading on 4 March 1982,<sup>32</sup> and was then referred to a Special Standing Committee of the House of Commons.

However, the form in which the Bill eventually passed into law was somewhat different from that in which it had left the House of Lords: a further clause was subsequently added concerning the prohibition upon proceedings without leave. As we have seen, it provided that:

“This section does not apply to proceedings against the Secretary of State or against a local authority within the meaning of the National Health Service Act 1977”.

As Gostin notes,<sup>33</sup> this exemption - which was ultimately enshrined as Section 139(4) of the 1983 Act - was the product of a compromise between members of the Standing Committee and the government, and, because of its essentially apolitical nature, did not require any further Parliamentary debate. It was “brought up” in Committee, read a First and Second time, and added to the Amendment Bill all on 24

44 See also: *House of Lords Debates*, 4 March 1982, Cols. 1419-1420

45 (1985) *Series A*, No. 93; 7 EHRR 528

46 (1992) 15 B.M.L.R. 1, C.A.

47 See also: Jones, R, *Mental Health Act Manual* (sixth edition), 1-1115

48 *Court of Appeal*, 5 July 1999 (unreported)

49 *Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983*, regulation 4(1)(e)(ii) - Form 9

50 [1994] 1 All E.R. 161

June 1982.<sup>34</sup>

The principal reason for this compromise is not hard to divine: it was Mr Ashingdane's case, which, with its complaints of breaches of Article 5(4)<sup>35</sup> and Article 6(1)<sup>36</sup> of the European Convention on Human Rights, was declared admissible by the European Commission of Human Rights on 5 February 1982 - four days after the third debate at the Committee Stage of the Amendment Bill and little more than a fortnight before the fourth such debate.<sup>37</sup>

The European Commission's view - and its anticipated effect upon the judgment of the Court - clearly loomed large in proceedings in Their Lordships' House.

### **The Amendment Bill in the House of Lords**

In order to understand how section 139 came to contain the exceptions listed in sub-section (4) - and no others - it is instructive to examine the various debates in the House of Lords, debates which, because of Government's approach, were the only ones to take place on the Amendment Bill.

There was a divergence of views as to how the Government should proceed. Lord Mottistone took a decidedly sceptical line. Thinking of the doctors and social workers who would have most to lose from the abandonment of the statutory protection, he argued that it might be "rather better to look to the general well-being and morale of public servants than to bother with what is happening across the Channel in Europe".<sup>38</sup> Others, however, attached considerable weight to the Strasbourg view, and differed only in their assessment of how the Government should respond to it.

During the second Committee Stage debate on 25 January 1982, Lord Elton suggested: "we have to await, before producing our own solution to the problem, the view which the European Commission ... will express".<sup>39</sup> Lord Renton did not agree. Speaking for an amendment which would entirely remove the section 141 provision from the new Act, he noted that the Ashingdane case would come before the European Commission in eleven days' time. There was little doubt, he said, that that case "will be as successful as other cases brought in the European Court of Human Rights about other aspects of our law relating to mental health",<sup>40</sup> and he therefore asked:

"May I make a suggestion to my noble friend, which could save a lot of public money and a great deal of concern on the part of those who are worried about Section 141; namely, that he accepts this amendment - that will perhaps convince the European Commission that there is no need for these cases to be proceeded with - and in due course comes up with a suitable Government amendment which he may discover would be acceptable to all concerned, including the European Court".<sup>41</sup>

During the third and last debate on the Committee stage, and facing further moves to repeal section 141, Lord Elton offered the suggestion that, "we are a little beforehand". The hearing of the Ashingdane case was a mere four days away, and "to anticipate the results of that would be unwise".<sup>42</sup> He persisted in this view even after the Commission's preliminary findings were known. Speaking at the Report stage, which commenced on 23 February 1982, he informed his brethren:

"Less than three weeks ago the Commission declared that that application was admissible after an

51 *Re S-C. (Mental Patient: Habeas Corpus)* [1996] 1 All E.R. 532, at pp 542-3

52 *Ibid.*, at p 544. *Re S-C* was subsequently considered by Owen J in *R v Central London County Court, ex parte AX London*, QBD, March 12 1997 [Ref CO/1842/96]. Its view of the distinction between the remedies of habeas corpus and judicial review was discussed but not followed in *B v BHB Community*

*Healthcare NHS Trust* [1999] FLR 106, CA

53 *The considerations to which he might wish to have regard in framing his proceedings are detailed in Jaconelli & Jaconelli, Tort liability under the Mental Health Act 1983, Journal of Social Welfare and Family Law* 20(2) 1998: 151-164

54 *S-C v Lancashire County Council, Court of Appeal*, 5 July 1999 (unreported)

oral hearing ... I would not invite noble Lords to anticipate the judgment they will now consider on its merits. I do not consider it sensible to amend our law at the very moment when the Commission ... has the opportunity to consider it in relation to an individual's application to them".<sup>43</sup>

Though this position, which Lord Elton maintained throughout each stage of the Amendment Bill's progress,<sup>44</sup> would ultimately prevail in the House of Lords, the Government acted very quickly when the Bill moved into the House of Commons. So quickly, in fact, that the new provision, exempting the Secretary of State and health authorities from the Section 139 protection, was introduced even before the European Commission gave its final ruling. This was perhaps - and certainly for Mr Ashingdane - fortunate for, on 12 May 1983, having once ruled the complaints admissible, the Commission held that there had in fact been no breach of the European Convention on Human Rights. On 28 May 1985, this was also the conclusion of the European Court of Human Rights.<sup>45</sup>

### Subsequent cases

The doctrine established in *Winch v Jones* has subsequently been widened somewhat. In *James v Mayor & Burgesses of the London Borough of Havering*,<sup>46</sup> Farquharson L.J. held that the effect of section 139 is wider than suggested by Sir John Donaldson M.R. in that "it is not only protection against frivolous claims; it is also a protection from error in the circumstances set out in [sub-section (1)]." He suggested that the point of the section is to provide protection for a social worker or doctor "from the consequences of a wrong decision made in purported compliance with this Act", and that "what one has to look at in deciding whether they are entitled to the protection of [this section] is what appeared to the social worker and the doctor at the time and how they reacted to it".<sup>47</sup>

### The cases of Mr S-C

It would be easy to infer from sections 139(2) and (4), and from the case of *Winch v Jones*, that there are two classes of potential defendant in Mental Health Act claims - corporate entities and individuals - and that prior leave is required only for proceedings against the latter. In fact, as is demonstrated by the recent case of *S-C v Lancashire County Council*,<sup>48</sup> such an inference would be mistaken, for there is still at least one species of "corporate" defendant which enjoys the protection of the statute.

Mr S-C was considered to be mentally ill and in need of in-patient treatment. In completing an application for his admission under section 3 of the Act,<sup>49</sup> the approved social worker certified, *inter alia*, that to the best of her knowledge and belief his "nearest relative" under the Act was his mother, who did not object to the proposed admission. In fact, and as the ASW knew, it was Mr S-C's father who was his nearest relative, and he objected very strenuously to his son's compulsory admission to hospital.

An application for a writ of *habeas corpus* was dismissed at first instance. Approving the judgment of Laws J. in *R v Managers of South Western Hospital and Another, ex parte M*,<sup>50</sup> Turner J. held that a detention could not be vitiated by subsequent knowledge, even where that knowledge cast doubt upon the truth of statements contained in the statutory forms. The hospital managers were entitled, under section 6(3), to act "without further proof" upon any admission application "which appears to be duly made". They



had no means of investigating the veracity of any after-acquired information and so;

“ ... if, and so long as, the form exists and unless or until the statutory machinery for discharge is effectively brought into play, the managers’ authority stems from the application form”.

The Court of Appeal did not accept this analysis. The then Master of the Rolls, Sir Thomas Bingham, dismissed the conclusion drawn by Turner J. The existence of an apparently valid application would not preclude a patient from demonstrating subsequently that his detention was unlawful. The alternative was “horrible”:

“It would mean that an application which appeared to be in order would render the detention of a citizen lawful even though it was shown or admitted that the approved social worker purporting to make the application was not an approved social worker, that the registered medical practitioners whose recommendations founded the application were not registered medical practitioners or had not signed the recommendations, and that the approved social worker had not consulted the patient’s nearest relative or had consulted the patient’s nearest relative and that relative had objected. In other words, it would mean that the detention was lawful even though every statutory safeguard built into the procedure was shown to have been ignored or violated ... I find that conclusion wholly unacceptable”.<sup>51</sup>

Concurring in this view, and likewise qualifying the decision in *R v South Western Hospital, ex parte M*, Neill LJ stated:

“ ... section 6(3) is not intended to prevent, nor can it have the effect of preventing, a court, if satisfied that the original application was not made in accordance with section 3 of the Act, from issuing a writ of habeas corpus ...”.<sup>52</sup>

Mr S-C was immediately discharged from hospital, and subsequently sought to commence proceedings for damages in wrongful imprisonment.<sup>53</sup> He proposed to direct those proceedings against the employer of the errant ASW, a local social services authority.

As we have seen, because of factors specific to the case of *Ashingdane*, the exemptions introduced into section 139(4) of the Act do not embrace local authorities, and Mr S-C would still therefore require prior leave under section 139(2). Once again, he failed at first instance, Ognall J holding that the ASW could have applied for an order under section 29 of the Act dispensing with the consent of the nearest relative. In his view, that order would certainly - and almost immediately - have been granted, and Mr Simpson-Cleghorn “would have suffered precisely the same consequences as are now complained of whether the detention was lawful or not”. His proposed proceedings, therefore, could have little or no prospect of success.

This view was, once again, overturned by the Court of Appeal. Lloyd LJ noted that, though such a course had indeed been open to her, and though it would in these circumstances have been the proper course, the ASW had not made an application to displace Mr Simpson-Cleghorn’s father. She had instead signed an application which was, and which she knew to be, untrue, and Mr Simpson-Cleghorn had been detained as a result. The correctness of Ognall J’s analysis “is not self-evident”. The threshold to be crossed was that set out by Lord Donaldson, MR. In this case, Mr Simpson-Cleghorn had been correct to assert that his claim deserved “the further investigation which would bring it within the test in *Winch v Jones*”. He might have his leave.<sup>54</sup>

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## Conclusion

The case of *Pountney v Griffiths* was the most significant to arise under section 141 of the 1959 Act, and it continues to be relevant even beyond the confines of that provision. The successor provision, contained in section 139 of the 1983 Act, differed from its predecessor in two ways. The first difference - the lack of specific criteria for the granting of leave - was quickly ameliorated by *Winch v Jones* and the introduction of a judge-made test which, though it was more liberal than the previous statutory test, would still place a substantive hurdle in the way of some intending plaintiffs. As the recent cases of Mr S-C have demonstrated, this common law test remains good law. It is, however, the second difference between sections 141 and 139 which is perhaps the more troubling.

It is intriguing to note the alacrity with which, almost a generation before the Human Rights Act 1998, the British legislature sought to give effect to what it believed to be the Strasbourg view. It is to be hoped that its predictive capabilities have sharpened somewhat with the passing of the decades.

Though Mr Ashingdane was undoubtedly fortunate that the British government decided to amend section 139 by removing the requirement for prior leave for proceedings against precisely those organisations whom he hoped to sue, and that it did so before the final outcome of his proceedings in the European Court was known, subsequent litigants have been less fortunate.

Mr S-C was compelled to go to the High Court, and thence to the Court of Appeal, only because, though it was no less "corporate" in nature, the local authority defendant whom he hoped to sue was of a species which had not figured in Mr Ashingdane's contemplated suit.

The anticipated result of that suit has cast a long - and perhaps disproportionate - shadow over subsequent practice. The inconvenient fact that the European Court ultimately rejected Mr Ashingdane's complaint has had no effect upon the subsequent application of section 139, nor has it led to the restoration of the exemptions removed by the Special Standing Committee.

For Mr S-C, it is undoubtedly a matter of regret that Mr Ashingdane did not bring a local social services authority within the ambit of his landmark proceedings. That this omission is the sole rationale for the immunity now uniquely enjoyed by such authorities is a matter for further regret.

1 *T Campbell and C Hegginbotham - Mental Illness, Prejudice, Discrimination and the Law* (1991. Dartmouth: Aldershot).

2 *Law Commission, Mental Incapacity. Law Com No 231* (1995. HMSO: London)